decision on this disputed question by the Pennsylvania Supreme Court.

Because public expediency calls for such liability, there is a strong urge on the courts to hold the owner liable, and various reasons have been advanced. For example, an early New York case held the owner liable on the ground that an automobile was a new and dangerous instrument,[29] but this was speedily overruled. In a few jurisdictions the liability has been created by statute.[30] It is of interest to note that a statute [31] making an automobile owner liable for injury caused by his automobile, even when driven without his consent, was declared unconstitutional on the ground that it deprived the owner of his property without due process of law.[32]

The final outcome of the confusion which this doctrine has caused is indeed doubtful. Based on an analogous extension of the doctrine of *respondeat superior,* which, although dubious and unsound to some, seems to be sound in its fundamental analysis, the "family purpose doctrine" appears to be another example of the recognized flexibility of the common law. Whether the flexibility here shown will survive the touch of a judiciary, already exasperated by a too great extension of the doctrine of *respondeat superior* in other directions, is difficult to foretell.

S. P. C.

THE PRIVILEGE PROTECTING ONE ACCUSED OF CRIME FROM BEING COMPELLED TO TESTIFY AGAINST HIMSELF.—"No right has been the subject of more jealous care than that which protects one accused of crime from being compelled to testify against himself." [1] This privilege against self-crimination [2] has been expressly provided for in the United States Constitution [3] and in the constitutions of every

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[29] Ingraham v. Stockamore, 63 Misc. 114, 118 N. Y. S. 399 (1909).

[30] In California, Statutes of 1917, Sec. 18, p. 407; and in Michigan, Sec. 29, Act No. 302 of Public Acts of 1915.

[31] Michigan, Act No. 318 of Public Acts of 1909.

[32] Levyn v. Koppin, 183 Mich. 232, 149 N. W. 993 (1914).

[1] Mr. Justice Day, now of the U. S. Supreme Court in McKnight v. United States, 115 Fed. 972, 54 C. C. A. 358 (1902).

[2] The privilege was born out of the mediæval clash between the king's court of justice and the Court Christian, when opposition was raised not to the practice of questioning the accused but to the practice of the court in doing it without jurisdiction. Not until the latter half of the seventeenth century, was the privilege extended, as we know it today. Wigmore in 5 HARV. L. REV. 71 (1891), and 15 HARV. L. REV. 610 (1902).

[3] The Fifth Amendment provides, *inter alia,* that no person "shall be compelled in a criminal case to be a witness against himself." It has been well settled that this is restrictive of federal action only, however. Barron v. Baltimore, 7 Peters 243, 8 L. ed. 672 (U. S. 1833).

state in the Union,[4] save two [5]—so necessary has this protection been regarded for the accused. The wordings of the constitutions differ, of course, in outlining the privilege. One constitution protects the accused from "testifying," [6] another from "furnishing evidence," [7] and still another protects him from "being a witness." [8] Yet it has been held that this variety of phrasing is immaterial in that it neither broadens nor narrows the scope of the immunity.[9]

But exactly what is the scope of this immunity, just what are the limitations of this doctrine founded on the old maxim of *nemo tenetur seipsum accusare?* [10] This question may well be asked and especially in view of the case of *Commonwealth v. Valeroso,*[11] decided recently by the Supreme Court of Pennsylvania. The court in that case held that the mere demand made by the Commonwealth on the accused to produce a letter constituted a violation of his constitutional privilege, because of the prejudicial inference which the jury might draw from his refusal to comply with the demand.

It appears from the cases that two elements must be present for the privilege to be violated. First, the accused must be *compelled* to incriminate himself,[12] for compulsion, it has been said, is the keynote of the prohibition.[13] Second, the compulsion must be directed by legal process against the accused person in the capacity of a witness; it must be *testimonial* compulsion.[14]

At first the guaranty only protected the accused from giving oral testimony.[15] This was due to the fact that in the ecclesiastical court, where opposition to inquisitorial methods was waged for two cen-

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[4] Stimson "Federal and State Constitutions of the United States," Book 3, par. 136. For example, Article 1, Section 9 of the Pennsylvania Constitution, provides that "he [the accused] cannot be compelled to give evidence against himself." Pub. L. 1887, p. 158.

[5] New Jersey and Iowa. In these states, in the absence of constitutional provision the right is held to have common law sanction. State v. Miller, 71 N. J. L. 527, 60 Atl. 202 (1904); State v. Height, 117 Iowa 650, 91 N. W. 935 (1902).

[6] Colorado, Art. II, Sec. 18.

[7] Massachusetts, Dec. of R., Art. 12.

[8] California, Art. I, Sec. 13.

[9] State v. Quarles, 13 Ark. 307 (1853); Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. Ct. 195 (1892).

[10] Broom's Legal Maxims, 8th Ed., p. 761. The maxim was first used by Coke as counsel in the case of Collier v. Collier, 4 Leon. 194 (Eng. 1589).

[11] 273 Pa. 213, 116 Atl. 828. (March, 1922).

[12] It must appear that such strong compulsion was used as to rob the accused of volition in the matter. Eaker v. State, 4 Ga. App. 649, 62 S. E. 99 (1908).

[13] People v. Kent, 10 Porto Rico 325 (1906).

[14] People v. Gardner, 144 N. Y. 119, 38 N. E. 1003 (1894).

[15] Wigmore, Evidence, Vol. 4, p. 3123.

turies,[16] the procedure was to place the accused under oath and wring from his own lips an admission of guilt. Now it is universally conceded that the privilege also exempts the accused from being compelled to produce books and papers [17] and all chattels which are capable at all of being made the subject of evidence.[18]

But on the question of offering the accused's own body in evidence, the courts are not of the same harmonious opinion.[19] Some courts have held that it is a violation of his constitutional right to compel the accused to exhibit himself for the purpose of identification and comparison.[20] There are decisions *contra* [21] however, based on the reasoning that if the privilege were extended to bodily exhibition, then logically the accused could object even to being present at his trial,[22] and it is necessary, of course, for him to be in court while he is being tried.[23]

This briefly outlines the scope of the privilege against self-crimination. In *Commonwealth v. Valeroso* [24] there was compulsion, and furthermore testimonial compulsion of sufficient nature to invoke the protection of *nemo tenetur seipsum accusare.* Demanding the letter of him in open court was forcing him to testify, if not by his words, then by his silence, which to the jury might appear equally significant as any syllables which he might have voiced.[25]

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[16] The procedure of the *ex officio* oath was summarily compelling the accused to testify in cases where he was entitled to remain silent unless witnesses were produced against him or his general bad repute shown. This practice was condemned by Chief Justice Coke in 12 Coke 26 (Eng. 1607).

[17] Rex v. Purnell, 1 W. Bl. 37 (Eng. 1749); Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. 524 (1885); Boyle v. Smithman, 146 Pa. 255, 23 Atl. 397 (1892).

[18] As for example, shoes, Moss v. State, 146 Ala. 686, 40 So. 340 (1906); a pistol, Davis v. State, 4 Ga. App. 274, 61 S. E. 132 (1908).

[19] 16 C. J., p. 567 and cases there cited.

[20] Walker v. State, 7 Tex. App. 246 (1879); State v. Nordstrom, 7 Wash. 506, 36 Pac. 382 (1893). The leading case, however, holding that bodily exhibition was a violation of the privilege was State v. Ah Chuey, 14 Nev. 79 (1879), which was decided by a divided court and accompanied by a strong dissenting opinion.

[21] State v. Jacobs, 50 N. C. 259 (1858); People v. Wolcott, 51 Mich. 612, 17 N. W. 78 (1883).

[22] "If an accused person were to refuse to be removed from jail to the court room for trial claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim." Wigmore, Evidence, Vol. 4, p. 3128.

[23] Amendment VI to the United States Constitution provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." Like clauses are contained in most of the state constitutions.

[24] Note 11, *supra.*

[25] McKnight v. United States, *supra,* in Note 1; State v. Markley, 74 Iowa, 695, 39 N. W. 111 (1888); Gillespie v. State, 5 Okla. Crim. 546, 115 Pac. 620 (1911).

The most learned contemporary text-writer on the subject of evidence has urged that the privilege protecting the accused from testimonial compulsion be kept within the strictest possible limits.[26] But why cannot the privilege be discarded altogether? Once there was necessity for it, to combat the inquisitorial procedure of the ecclesiastical courts and the Court of the Star Chamber,[27] but the day of rack and thumb-screw methods has passed and at present there appears to be little reason for the rule. The absurdity of some of the reasons which have been advanced in support of the privilege must be evident from a mere glance at them.[28] There is the "old woman's reason," the essence of which is contained in the word "hard," that is, hard upon a man to be obliged to criminate himself. Then the "fox hunter's reason," which introduces the idea of fairness, that the accused, as the hunted fox, should have his chance of escape. There is the argument, too, that it is giving sanction to torture to allow the accused to be questioned; and finally the absurd sophism that whatever the inquisition did was wrong; this is one of the things which the inquisition did and therefore this is wrong.

These represent, obviously, weak logical support for the privilege. Entitled to more recognition among the arguments advanced in favor of the immunity are those which go to show that our system of prosecution would "suffer morally" [29] if compulsory self-disclosure were allowed. These urge that to permit the accused to be compelled to testify would lead to a laziness on the part of the prosecutors, who would develop then a tendency to rely chiefly, if not exclusively, on the testimony of the accused; ignoring other sources of evidence which might prove valuable. The exercise of the power to extract answers also, it is argued, might readily lead to bullying and browbeating and even to physical force and torture. But these arguments, too, are of little weight because the assumption that the prosecution would so abuse its office, especially in court, is highly conjectural.

Regardless of the care with which the privilege has been so far fostered, there is much to be said for the view that it should now be abolished. It is the traditional remnant of just opposition against official torture, long obsolete. In a moment of temporary agitation against an inquisitorial practice inaugurated on the Continent at the

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[26] Wigmore, Evidence, Vol. 4, p. 3102.

[27] Sir J. F. Stephens, "History of Criminal Law," Vol. 1, 342.

[28] Mr. Jeremy Bentham, "Rationale of Judicial Evidence," b. IX, pt. IV, chap. III (Bowrings ed., Vol. VII, p. 452). The fault with this writer's criticism of the privilege appears to be in his assumption that the accused is always guilty.

[29] Wigmore, Evidence, Vol. 4, p. 3097.

time, the immunity was incorporated into our fundamental law,[30] but there is no need sentimentally to retain it now. The privilege which exempts the accused from being compelled to give evidence is extremely undesirable at this time in that it unquestionably shields crime and offers protection for the guilty criminal.[31] In this day when crime is so deplorably rampant it seems extremely foolhardy to continue, without reason, the practice of making each guilty criminal "the fond object of the court's doting tenderness, guiding him at every step in the path of unrectitude and lifting up his feet lest he fall into the pits digged for him by justice and by his own offenses." [32]

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[30] At the time of the Colonial Conventions, agitation was being carried on in France against the inquisitorial features of the *Ordonance of 1670*. It is interesting to note, in this connection, that the privilege is not allowed today in France or in any of the Continental countries.

[31] Chief Justice Appleton, "Rules of Evidence," Chap. VI, p. 134.

[32] Wigmore, "Evidence," Vol. 4, p. 3101.